

1 MELINDA HAAG (CSBN 132612)  
United States Attorney

2 MIRANDA KANE (CABN 150630)  
3 Chief, Criminal Division

4 RICHARD C. CHENG (CSBN 135992)  
Assistant United States Attorney

5 150 Almaden Boulevard, Suite 900  
6 San Jose, California 95113  
Telephone: (408) 535-5032  
7 Facsimile: (408) 535-5066  
8 e-mail address: richard.cheng@usdoj.gov

9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 DAVID RUSSELL FOLEY,

17 Defendant.

No. CR 09-00670-EJD  
CR 11-00554-EJD

PLEA AGREEMENT

18 I, DAVID RUSSELL FOLEY, and the United States Attorney's Office for the Northern  
19 District of California ("Government") enter into this written plea agreement ("Agreement")  
20 pursuant to Rules 11(c)(1)(A) and 11(c)(1)(B) of the Federal Rules of Criminal Procedure:

21 The Defendant's Promises

22 1. I agree to plead guilty to Count One of Superseding Indictment CR09-00670-EJD,  
23 charging me with Conspiracy to Commit Mail Fraud and Wire Fraud, in violation of 18 U.S.C.  
24 § 1349; and to Count One of Indictment CR11-00554-EJD, charging me with Conspiracy to  
25 Commit Bank Fraud, in violation of 18 U.S.C. § 1349.

26 //

27 //

28 PLEA AGREEMENT (David Russell Foley)  
CR 09-00670-EJD and CR 11-00554-EJD

FILED

JAN 06 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

1 Count One (Indictment CR 09-00670-EJD)

2 I agree that the elements of Conspiracy To Commit Mail and Wire Fraud are as follows:

3 (1) There was an agreement between two or more persons to commit mail fraud, in violation of  
 4 18 U.S.C. § 1343 and wire fraud, in violation of 18 U.S.C. § 1341, that is, to make up a scheme  
 5 or plan for obtaining money or property by making false promises or statements, knowing that  
 6 the promises or statements were false and material, in that it would reasonably influence a person  
 7 to part with money or property; and that I acted with the intent to defraud, and I used, or caused  
 8 to be used, the mails and wires to carry out or attempt to carry out an essential part of the  
 9 scheme; and (2) I became a member of the conspiracy knowing of at least one of its objects and  
 10 intended to help accomplish it.

11 I further agree that the maximum penalties for Conspiracy To Commit Mail and Wire  
 12 Fraud are as follows:

- |    |    |                                 |   |
|----|----|---------------------------------|---|
| 13 | a. | Maximum prison sentence         | 20 years imprisonment                       |
| 14 | b. | Maximum fine                    | \$250,000 (or twice the gross gain or loss) |
| 15 | c. | Maximum supervised release term | 3 years                                     |
| 16 | d. | Mandatory special assessment    | \$100                                       |
| 17 | e. | Forfeiture and restitution      | As ordered by the Court                     |

18 Count One (Indictment CR 11-00554-EJD)

19 I agree that the elements of Conspiracy to Commit Bank Fraud are as follows:

20 (1) There was an agreement between two or more persons to commit bank fraud, in violation of  
 21 18 U.S.C. §1344, that is, to knowingly carry out a scheme or plan to obtain money or property  
 22 from a financial institution by making false statements or promises, knowing the statements or  
 23 promises to be false; and knowing that the statements were material in that they would  
 24 reasonably influence a financial institution to part with money or property; and that I acted with  
 25 the intent to defraud; and that Countrywide Home Loans was a federally charged or insured  
 26 financial institution.  
 27  
 28

1 I further agree that the maximum penalties for Conspiracy to Commit Bank Fraud are as  
2 follows:

- |   |    |                                 |                         |
|---|----|---------------------------------|-------------------------|
| 3 | a. | Maximum prison sentence         | 30 years imprisonment   |
| 4 | b. | Maximum fine                    | \$1,000,000             |
| 5 | c. | Maximum supervised release term | 5 years                 |
| 6 | d. | Mandatory special assessment    | \$100                   |
| 7 | e. | Forfeiture and restitution      | As ordered by the Court |

8 2. I agree that I am guilty of the offenses to which I will plead guilty, and I agree that  
9 the following facts are true:

10 a. From approximately no later than June 2006 and continuing to on or about  
11 February 2008, Michael Daddona ("Daddona") and I conspired and agreed to devise a scheme to  
12 obtain money by making false or fraudulent representations by mail and wire and to sell thumb  
13 drives known as "game packs," by mail and wire, containing video gaming software that could be  
14 loaded onto full arcade video game machines made for the home or arcade markets. Daddona  
15 and I knew that such false representations, that the manufacturer of the goods to be a company  
16 called Ultracade, were material to the customers of game packs. I became a member of this  
17 conspiracy knowing that the object was to obtain money and I intended to help accomplish it.

18 b. Specifically, as the previous operator and owner of a NexTune  
19 Corporation, d/b/a UltraCade Technologies ("UltraCade"), a developer and marketer of gaming  
20 software for the home arcade game market, located in San Jose, California, I agreed and  
21 conspired to continue to manufacture and sell game packs to Daddona at a time I knew I was no  
22 longer associated with the company or its successor-in-interest. During all times between June  
23 2006 and continuing to on or about February 2008, I knowingly manufactured game packs from  
24 my residence in Los Gatos, California. After I manufactured game packs, I sold them to  
25 Daddona, and I agreed that he could then sell game packs to the public using packaging and  
26 advertisements that falsely represented the goods to be UltraCade. It was further part of our  
27 agreement, and our intent, that I would continue to sell Daddona game packs by mail and he  
28 would continue to sell them and receive payment by mail and wire.

1 c. Beginning no later than September 23, 2006, and continuing on to or about  
2 October 3, 2006, in the Northern District of California and elsewhere, I knowingly and  
3 intentionally combined, conspired and agreed with Robert DeKett, to commit bank fraud by  
4 conspiring to devise, and devising a scheme and artifice to defraud Countrywide Home Loans  
5 (Countrywide) as to a material matter, and to obtain any of the monies, funds, credits, and assets  
6 owned by, and under the custody and control of, Countrywide, by means of materially false and  
7 fraudulent pretenses, representations, and promises and material omissions, namely my signing  
8 on October 3, 2006, a copy of the Uniform Residential Loan Application ("URLA") previously  
9 submitted to Countrywide, for a mortgage in the amount of \$2,624,475, and a home equity line of  
10 credit in the amount of \$374,925, showing that Global VR was my current employer, when in  
11 fact, as I well knew, I had been terminated from Global VR on September 23, 2006.

12 d. To accomplish the object of the conspiracy and as part of the scheme and  
13 artifice to defraud Countrywide, I instructed Robert DeKett to contact Countrywide to confirm  
14 my employment at Global VR

15 e. To accomplish the object of the conspiracy and as part of the scheme and  
16 artifice to defraud Countrywide, I instructed Robert DeKett to verify my employment as I stated  
17 in the URLA and home equity applications when Robert DeKett was contacted by Countrywide,  
18 even though Robert DeKett knew that I was no longer employed by Global VR or earning a  
19 salary at the time I received the Countrywide loans.

20 f. During the conspiracy, Robert DeKett and I knew that the false  
21 employment verifications made by Robert DeKett were material to Countrywide's decision to  
22 fund my home mortgage and my home equity line of credit.

23 3. I agree to give up all rights that I would have if I chose to proceed to trial,  
24 including the rights to a jury trial with the assistance of an attorney; to confront and cross-  
25 examine government witnesses; to remain silent or testify; to move to suppress evidence or raise  
26 any other Fourth or Fifth Amendment claims; to any further discovery from the government; and  
27 to pursue any affirmative defenses and present evidence.

28

1           4. I agree to give up my right to appeal my convictions, the judgment, and orders of  
2 the Court. I also agree to waive any right I may have to appeal any aspect of my sentence,  
3 including any orders relating to forfeiture and/or restitution.

4           5. I agree not to file any collateral attack on my conviction or sentence, including a  
5 petition under 28 U.S.C. § 2255 or 28 U.S.C. § 2241, or motion under 18 U.S.C. § 3582, at any  
6 time in the future after I am sentenced, except that I reserve my right to claim that my counsel  
7 was ineffective in connection with the negotiation of this Agreement or the entry of my guilty  
8 plea. I understand that the government will not preserve any physical evidence obtained in this  
9 case.

10          6. I agree not to ask the Court to withdraw my guilty plea at any time after it is  
11 entered. I understand that by entering into this Agreement: (a) I agree that the facts set forth in  
12 Paragraph 2 of this Agreement shall be admissible against me under Fed. R. Evid. 801(d)(2)(A)  
13 in any subsequent proceeding, including at trial, in the event I move to withdraw my guilty plea  
14 to the charge in the Indictments, and (b) I expressly waive any and all rights under Fed. R. Crim.  
15 11(f) and Fed. R. Evid. 410 with regard to the facts set forth in Paragraph 2 of this Agreement in  
16 such subsequent proceeding.

17          7. I agree that the Court will use the Sentencing Guidelines to calculate my sentence.  
18 I understand that the Court must consult the Guidelines and take them into account when  
19 sentencing, together with the factors set forth in 18 U.S.C. § 3553(a). I also understand that the  
20 Court is not bound by the Guidelines calculations below, the Court may conclude that a higher  
21 Guidelines range applies to me, and, if it does, I will not be entitled, nor will I ask to withdraw  
22 my guilty plea. I agree that regardless of the sentence that the Court imposes on me, I will not be  
23 entitled, nor will I ask, to withdraw my guilty plea. I also agree that the Sentencing Guidelines  
24 offense level will be calculated as follows. I also reserve my right to argue for a variance from  
25 the Guidelines range based on 18 U.S.C. § 3553(a) factors. The parties have reached no  
26 agreement regarding my Criminal History Category.

27 //

28 //

Count One (Indictment CR 09-00670-EJD):: Conspiracy to Commit Mail Fraud and Wire Fraud

a. Base Offense Level, U.S.S.G. § 2B1.1: 7

b. Specific offense characteristics:

1. Amount Of Loss: Up to +16  
 U.S.S.G. § 2B1.1(b)(1)(I)  
 The Government will be allowed to argue the amount of loss is no more than 3,211 units multiplied by \$479 per unit, or \$1,589,069. The Defendant will be allowed to argue the amount of loss is as low as \$0.

c. Acceptance of Responsibility: -3

If I meet the requirements of U.S.S.G. § 3E1.1, I may be entitled to a three-level reduction for acceptance of responsibility, provided that I forthrightly admit my guilt, cooperate with the Court and the Probation Office in any presentence investigation ordered by the Court, and continue to manifest an acceptance of responsibility through and including the time of sentencing:

d. Adjusted offense level: Up to 20

Count One (Indictment CR 11-00554-EJD):Conspiracy To Commit Bank Fraud

a. Base Offense Level, U.S.S.G. § 2X1.1 and § 2B1.1 7

b. Specific offense characteristics:

1. Amount Of Loss: Up to +18  
 U.S.S.G. § 2B1.1(b)(1)(E).  
 The Government will be allowed to argue the total amount of loss exceeded \$2.5 million. The Defendant will be allowed to argue that the victim loss was as little as \$0.

c. Acceptance of Responsibility: -3

If I meet the requirements of U.S.S.G. § 3E1.1, I may be entitled to a three-level reduction for acceptance of responsibility, provided that I forthrightly admit my guilt, cooperate with the Court and the Probation Office in any presentence investigation ordered by the Court, and continue to manifest an acceptance of responsibility through and including the time of sentencing:

d. Adjusted offense level: Up To 22

The parties agree that the combined offense level, if any, pursuant to U.S.S.G.

1 § 3D1.4, will be decided by the Court subsequent to the Court's determination of the appropriate  
2 loss amounts of each of the two counts of conviction.

3 The Government further agrees to recommend the low end of the applicable guideline  
4 range as determined by the Court.

5 8. I agree that regardless of any other provision of this Agreement, the government  
6 may and will provide the Court and the Probation Office with all information relevant to the  
7 charged offense and the sentencing decision.

8 9. I agree to pay restitution for all the losses caused by all the schemes or offenses  
9 with which I was charged in this case, and I agree that the amount of restitution will not be  
10 limited to the loss attributable to the counts to which I am pleading guilty, pursuant to 18 U.S.C.  
11 § 3663(a)(3). I agree that any fine, forfeiture, or restitution imposed by the Court against me will  
12 be immediately due and payable and subject to immediate collection by the government and I  
13 understand that the government may seek immediate collection of the entire fine, forfeiture, or  
14 restitution from any assets without regard to any schedule of payments imposed by the Court or  
15 established by the Probation Office. I agree that I will make a good-faith effort to pay any fine,  
16 forfeiture, or restitution I am ordered to pay. Before or after sentencing, I will upon request of  
17 the Court, the government, or the Probation Office, provide accurate and complete financial  
18 information, submit sworn statements and give depositions under oath concerning my assets and  
19 my ability to pay, surrender assets I obtained as a result of my crimes, and release funds and  
20 property under my control in order to pay any fine, forfeiture, or restitution. I agree to pay the  
21 special assessment at the time of sentencing.

22 10. I agree not to commit or attempt to commit any crimes before sentence is imposed  
23 or before I surrender to serve my sentence; not to violate the terms of my pretrial release; not to  
24 intentionally provide false information or testimony to the Court, the Probation Office, Pretrial  
25 Services, or the government; and not to fail to comply with any of the other promises I have  
26 made in this Agreement. I agree that, if I fail to comply with any promises I have made in this  
27 Agreement, then the government will be released from all of its promises, but I will not be  
28 released from my guilty plea.



11. If I am prosecuted after failing to comply with any promises I made in this Agreement, then (a) I agree that any statements I made to any law enforcement or other government agency or in Court, whether or not made pursuant to the cooperation provisions of this Agreement, may be used in any way; (b) I waive any and all claims under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of my statements, or any leads derived from those statements; and (c) I waive any defense to any prosecution that it is barred by a statute of limitations, if the limitations period has run between the date of the captioned Superseding Indictment and the date I am indicted on additional charges.

12. I agree that this Agreement contains all of the promises and agreements between the government and me, and I will not claim otherwise in the future.

13. I agree that this Agreement binds the U.S. Attorney's Office for the Northern District of California only, and does not bind any other federal, state, or local agency.

#### The Government's Promises

14. The government agrees to move to dismiss any open charges pending against the defendant in Indictment CR 09-00670-EJD and Indictment CR 11-00554-EJD, at the time of sentencing.

15. The government agrees not to file any additional charges against the defendant that could be filed as a result of the investigation that led to the captioned Indictments.

16. The government agrees to recommend the Guideline calculations set out above, unless the defendant violates the terms of the Agreement above or fails to accept responsibility.

#### The Defendant's Affirmations

17. I confirm that I have had adequate time to discuss this case, the evidence, and the Agreement with my attorney and that my attorney has provided me with all the legal advice that I requested.



1           18. I confirm that the while I considered signing this Agreement, and at the time I  
2 signed it, I was not under the influence of any alcohol, drug, or medicine that would impair my  
3 ability to understand the Agreement.

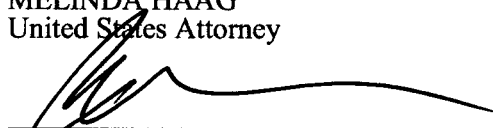
4           19. I confirm that my decision to enter a guilty plea is made knowing the charges that  
5 have been brought against me, any possible defense, and the benefits and possible detriments of  
6 proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no  
7 one coerced or threatened me to enter into this Agreement.

8  
9 Dated: 1/6/12

  
DAVID RUSSELL FOLEY  
Defendant

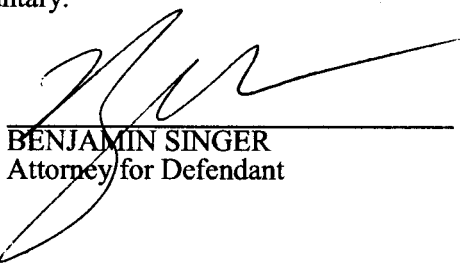
MELINDA HAAG  
United States Attorney

11  
12  
13 Dated: January 6, 2012

  
RICHARD C. CHENG  
Assistant United States Attorney

14  
15  
16 I have fully explained to my client all the rights that a criminal defendant has and all the  
17 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement  
18 and all the rights he is giving up by pleading guilty, and, based on the information now known to  
19 me, his decision to plead guilty is knowing and voluntary.

20  
21 Dated: 1/6/12

  
BENJAMIN SINGER  
Attorney for Defendant